MOTION FILED

FEB 5 1976

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-772

JOHN FRANKLIN, et al.,
Appellants

v.

F. EMMETT FITZPATRICK, District Attorney of Philadelphia County, et al.,
Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM

BONNIE BRIGANCE LEADBETTER
2400 Centre Square West
Philadelphia, Pennsylvania 19102

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MOTION TO AFFIRM

Appellee, F. Emmett Fitzpatrick, District Attorney of Philadelphia County, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the district court be affirmed on the ground that the question raised is so unsubstantial as not to warrant further argument.

ARGUMENT

Appellants challenge the Informed Consent provision of the Abortion Control Act[1/] on two bases. First, appellants

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1/ Pa. Stat. Ann. tit. 35 §6601 et seq.

claim that this law invades the privacy of the physician-patient relationship, and the Commonwealth has shown no compelling state interest justifying this invasion. This claim is without merit for several reasons. Earlier cases in this Court make clear that in order to call into play a searching judicial scrutiny of a state statute, the moving party must show the existence of some fundamental constitutional right and that the statute measurably impedes the exercise of that fundamental right. See e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

While a woman may have a fundamental right to choose to have an abortion (subject to the limitations outlined in Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973)), that right is meaningful only if she has an opportunity to make an informed choice. There is no constitutional right, fundamental or otherwise, invested in a physician to perform an abortion on a woman who has not knowingly and voluntarily consented to the surgical procedure.

Next, as the court below found[2/]:

2/ All page citations to the Opinions below will refer to the Appendix to appellants' jurisdictional statement. While written as a concurrence and dissent, the Opinion of Circuit Judge Adams became the opinion of the court on the Informed Consent issue.

> No evidence has been adduced that persuades me that the information a doctor is requested to give under the statute would measurably chill the exercise of the abortion option.

Opinion, Adams, J., p. A67. The burden of showing a chilling effect on the exercise of the abortion option was on the plaintiffs (appellants herein). Appellants simply failed to sustain this burden at trial. Moreover:

> To the extent the requisite information respecting the alternatives to abortion are inappropriate in any particular case, the physician is not prohibited from so indicating to the patient en passant . . . . Proper counseling, it would appear, could incorporate the information demanded by the state and tailor the comprehensive advice to the individual case.

Opinion, Adams, J., at p. A69.

Thus, the only inquiry here appropriate is whether any valid state purpose is reasonably related to the statute. Cf., San Antonio School District v. Rodriquez, supra. There is clearly such a relationship. As was stated in Planned Parenthood of Central Missouri v. Danforth, 392 F.Supp. 1363 (E.D. Mo. 1974) (probable jurisdiction noted by this Court as of No. 74-1151, October Term, 1975)):

> Given the fact that even with counseling the decision of whether to erminate a pregnancy is often a stressful one . . . it is imperative that a woman be well advised of the options available, and the physical and psychological ramifications of choosing a particular course of action.
>
> * * * *
>
> [A]lthough the abortion decision is to be made in consultation with a responsible physician, the ultimate decision is not the physician's to make. The consent requirement of Section 3(2) insures that the pregnant woman retains control over the discretions of her consulting physician.

Id. at 1368-1369.

This state interest in the welfare of its citizens is intensified where, as here, the decision may be (and frequently is) made by teenagers without the benefit of parental support or guidance.

Appellants' second line of attack is an equal protection claim. They complain that the Informed Consent provision violates "the Fourteenth Amendment by regulating abortions more stringently than other medically indistinguishable procedures". (Jurisdictional Statement at 7). This claim is devoid of merit. First, the court below found that this section of the Act merely codified the common law with

respect to informed consent for all surgical procedures. See, Dunham v. Wright, 423 F.2d 940 (3d Cir. 1970). Next, with respect to the patient's decision to consent to surgery, there is no such thing as a "medically indistinguishable procedure". This Court noted the peculiar psychological pressure attendant to the abortion decision in Roe v. Wade, supra at 153. Additionally, as the court below pointed out:

> Rather, the separate treatment is suggested not by the choice of abortion, but by the realities of the system that provides abortions.
>
> Abortions are frequently obtained in a specialized clinic or hospital department where a woman is removed from familiar medical surroundings. Most frequently the abortion is not done by a woman's regular doctor. The procedures, perhaps routine for those performing them, will probably be totally unlike any others theretofore undergone by the patient. In addition, as the record in this case indicates, the woman may well be experiencing considerable emotional anxiety.
>
> Generally, the abortion decision is somewhat hurriedly arrived at and executed. It, in many cases, may be attended by a reticence that works to close off ordinary avenues

> of information to the patient either from friends or from family members.

Opinion, Adams, J., at p. A68.

Therefore, it is submitted that the questions raised by appellants herein are so unsubstantial as not to need further argument.

Wherefore, it is respectfully requested that this Honorable Court affirm the order of the court below.

Respectfully submitted,

BONNIE BRIGANCE LEADBETTER
Counsel for
F. Emmett Fitzpatrick